IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

**No. 79-279**

MAGNUS PETROLEUM COMPANY, INC. AND
MARPAT CORPORATION,

*Petitioners*

v.

SKELLY OIL COMPANY,

*Respondent*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITIONERS' REPLY MEMORANDUM

IRVING I. SAUL
6929 North Main Street
Dayton, Ohio 45415
Telephone: (513) 278-4858

*Counsel for Petitioners*

October 9, 1979

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## PETITIONERS' REPLY MEMORANDUM

### PETITIONERS' ARGUMENTS IN REPLY

**1. The Misconstrued Precedent that "Antitrust Laws Protect Competition, Not Competitors" Must be Tempered To Reflect a Judicial Perspective Which Requires Flexibility in its Application Where, As in the Realities of Gasoline Marketing, Individual Competitors Must Be Protected in the Very Interests of Preserving Competition.**

Respondent urges that in reversing the District Court, the court below faithfully adhered to consistently followed precedent. However, when the very rigidness of that consistency has the effect of passing over the substantive considerations which gave rise to the precedent in favor of merely manifesting an inflexible loyalty to precedent for precedent's sake, then it is quite appropriate for this sovereign Court which is not bound by precedent (even its own), to undertake the tempering of such rigidity with an injection of judicial perspective.

When there are those in a position to know that a challenged restrictive practice is one of long standing prevalence throughout an industry, then the testimony of such experts should suffice when their testimony bears witness to that practice, its enduring prevalence, and the parallel restrictiveness among the major competitors in every relevant geographic market of both the object and effect of that practice. The presently prevailing judicial insistence on comprehensive economic data and analysis as applied in the instant case essentially requires virtually unavailable economic proof of a practice, the long standing prevalence of which is so well known in the involved industry as to be virtually axiomatic.

Even Skelly itself adamantly refused to disclose such matters to Magnus in the instant case. The very type categories of comprehensive data as Skelly lists at p. 24 of its "Brief of Respondent" was sought by Magnus' Interrogatory No. 11, appended *infra* at p. 1 a. Skelly's reply to that discovery effort, appended *infra* at p. 3 a, is as follows:

> "Defendant objects to Interrogatory No. 11 on the grounds that it is vague and ambiguous and is irrelevant to the subject matter and not reasonably calculated to lead to the discovery of admissible evidence."



Moreover, during trial Skelly succeeded in its objection to Magnus' endeavor to elicit exclusive dealing specifics with respect to another competing major brand. The following transpired during Magnus' direct examination of John J. Wilson, a former Texaco jobber:

> Q. And with respect to your operation, to what extent did that supply commitment relate, to how much of your total operation?
>
> A. You mean as far as what we contracted for?
>
> Q. As a minimum.
>
> MR. PARSONS: Your Honor, it's belated, but objection on the grounds of relevancy. The terms of this man's arrangements with Texaco don't bear any relation to the issue here. (369-372).[1]

With such roadblocks being encountered by a private enforcement plaintiff just from the other party to the litigation, it is not difficult to envision the barrage of more deserving objections that he can realistically expect from a battery of lawyers representing nonparties whose comprehensive data he would need to meet the prohibitive burden which Skelly has called for and which the court below has embraced. And, the court below expressly recognized that "[i]t was impossible to estimate the amount of Skelly gallons sold through Skelly-financed stations," since such record

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[1]The Court of Appeals dismissed the cross-appeal addressed to the sustaining of this objection. (Petition, p. 16a, n.27).

keeping never comes into existence. (Petition, pp. 16, 12a). For the same reason, the same impossibility would apply to each of Skelly's competitors, as well.[2] Indicative of the prohibitive cost to a small business in garnering even the most rudimentary data is the $11,000 expenditure which Skelly incurred in the instant case just to prove the obvious correlation that exists between where people live and where they purchase gasoline for their automobiles. (702-710, 755).

Nor would the obviation of the need of comprehensive economic data and analysis by the use instead of expert testimony as to the fact of such long standing prevalence, do violence to the principle expressed in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 53 n. 21 (1977), that "an antitrust policy divorced from market considerations would lack any objective benchmarks." This, because the fact of anticompetitive impact is manifest from just the fact of the widespread extent of the *offers* by the various oil companies to their respective franchised jobbers of the lock-in entrapment which the long-standing, prevalent lease/lease-back/franchise device is designed to permit. Particularly, when such prevalence is throughout an industry comprised of consciously interdependent, behaviorally parallel competitors, such as exist in the gasoline marketing segment of the oil industry throughout the United States.

[2]Plaintiffs' Exhibit 181 did present statistics published in the 1972 and 1973 issues of the National Petroleum News Factbook setting forth for each oil company the number of each company's branded service stations as are "Supplied direct" and the number that are "Supplied through distributors", as well as the number of branded retail outlets that each company markets through in each state. Such is the extent of the detail so published.



While the paths of reasoning may differ, under such circumstances there is no more ultimate justification for rigidly burdening the private enforcement antitrust plaintiff with the virtually impossible requirement of quantifying that manifest fact of adverse impact upon competition than there would be to rigidly requiring him to comprehensively quantify the extent of his own resulting damages once he has established the requisite fact of damage. This Court dispensed with the burden of a comprehensive quantification of damages in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), whenever it would be unrealistic to require more than a reasonable estimate based on relevant data. So, also, should this Court take the opportunity which the instant case affords to direct the lower courts to dispense with their rigid insistence upon a comprehensive quantification of adverse market impact when either such evidence would be impossible to obtain, or if possible only so at a prohibitive cost which the smaller business victims of anticompetitive conduct simply could not afford, and when the challenged restrictive practice is one of long standing prevalence throughout an industry.

To do less is to continue the confinement of such small business victims to antitrust relief only from obvious and egregious instances of unlawful price fixing and other *per se* type conduct—a limited access that is hardly in keeping with the underlying social and political purpose of the antitrust laws. Certainly, the antitrust laws were conceived, at least in part, with the underlying social and political purpose of preserving the competitive opportunities of small business. In the simple interests of justice, the goals of those laws must not be permitted to be myopically perceived in terms of only economic efficiencies. As Judge Lear-

ned Hand stated in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 247 (2d Cir. 1945):

> ". . . Congress . . . did not condone 'good trusts' and condemn 'bad' ones; it forbad all. Moreover, in so doing it was *not necessarily actuated by economic motives alone*. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes." (Emphasis added.)

For a more recent discussion of the non-economic component of American antitrust policy and the non-economic goal of strengthening and preserving the competitive position of small concerns (even if need be at some economic cost), that inheres in the interrelated network of congressional legislation that comprise and supplement the antitrust laws, see Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. Penn. L.R. 1076 (1979), in which the author states at p. 1078:

> "The dogma that 'antitrust laws protect competition not competitors' overstates the case and ignores considerations of justice. One must amend that declaration by adding at least the following qualification: 'unless individual competitors must be protected in the interests of preserving competition.' "

This qualification is particularly essential with respect to gasoline marketing, where the small entrepreneur is fast becoming a vanishing species.[3]

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[3]The Dayton Daily News newspaper published an article in its issue of Thursday, August 16, 1979, entitled *"Independent gas dealers vanish at alarming rate,"* setting forth the following, *inter alia:*

> ". . . Statistics compiled for a House [of Representatives] subcommittee show that almost 100,000 small gasoline dealers have gone out of business since 1972. The volume of gasoline sold by refiner-operated stations almost doubled during the same time period.
>
> . . .'With consumption of branded gasoline virtually unchanged and gasoline prices tripling since 1972, it would appear that more than just natural market forces may be accountable for the disappearance of these small businesses,' the report said."

The entire article is appended hereto *infra* at p. 5 a.



The current trend of interpretation of the antitrust laws, in which respondent rejoices and to which the reasoning behind the reversal in the court below adheres, promotes an elimination of competition by effectively sanctioning the removal of competitors.

**2. Question 3 of the Petition Addressing the Failure of the Court of Appeals to Consider With Respect to the Exclusive Dealing Condition Proscribed By §3 of the Clayton Act, the Vital Differentiation Between Branded and Unbranded Gasoline, is Properly Before This Court Because It Was Presented To The Court of Appeals.**

Respondent is in error in its argument at pp. 14-15 of its brief that the subject of Petitioners' Question 3 should not be considered by this Court because "[t]his theory was not advanced in the courts below." The very essence of Magnus' challenge at trial and on appeal was addressed to Skelly, in conjunction with the well-known, industry-wide prohibition against "dual distribution," using its financing instruments with its jobbers to effectively make those jobbers unavailable for undertaking the franchised brand of Skelly's competitors. This, by Skelly using those instruments as it

does to lock the jobber into the Skelly franchise for many years beyond the facial five year term of that franchise, being until the expiration of the full fifteen year term of the most recent financing lease.[4]

Moreover, the point was expressly reemphasized before the Court of Appeals in Magnus' petition for rehearing and suggestion for rehearing *in banc*. At p. 11 thereof, Magnus stated:

> "... [T]he Panel has failed to take into consideration the vital differentiation between Magnus' continuing freedom to purchase unbranded gasoline on the "spot" market, and Magnus' lack of freedom to purchase branded product under a contemporaneous franchise with any branded competitor of Skelly. ...Skelly...knew...that unless Magnus was willing to walk away from its financed stations, that the continuation of the Skelly franchise until the financing leases would run their full 15 year terms would effectively disenable Magnus from undertaking the purchase of any branded product under the franchise of any branded competitor of Skelly for the full length of those leases. So, in the realistic context of brand competition and branded competitors, Magnus was indeed restricted exclusively to Skelly. (170-71, 109-110, 161-63, 415-16, 627, 343, 351-56)."

[4]Magnus' own experience when he dared seek a mutual cancellation of the franchise effective July 1, 1968, reflects the stark peril which the device permitted. Arthur Magnus testified thusly:

> [Skelly's Sales Representative, Richard Terwilliger] said, "Well, you must understand that if we honor this request and cancel your franchise that the three service stations that are financed with us will remain with us, and whatever you do ... whatever products you handle, Skelly Products will be in those three service stations; and, in addition to that, your monthly payments of $1180.00 will have to continue for the balance of the fifteen-year period, and we have the prerogative then of renting it for [I know he said] a dollar a year."
>
> ..."Do you really want to continue this letter, to go through the channels to cancel the lease or cancel the contract?" And I said, "Well, I can't very well afford $1180.00 a month and not be able to control my own stations." And he said, "Well, if you raise too much hell about it," he said, "we have—we can cancel any time on the terms of the franchise which will leave those stations to our disposition and you'll be without them at any time." So, he just suggested that I don't make a lot of noise about it, unless I want to go ahead with the consequences that he had just proposed to me. Well, the upshot of the meeting was that I decided that I'd better not—I told him to just forget the whole thing really is what it amounted to. (162-63).



In any event, even *arguendo* if the Court of Appeals be deemed correct in its holding that Skelly did not impose the exclusive dealing condition required for a violation of §3 of the Clayton Act, the absence of such condition would not be fatal to Magnus' §1, Sherman Act claim because §1 of the Sherman Act does not require the existence of any such condition before the lease/leaseback/franchise device may be deemed a contractual arrangement in unreasonable restraint of trade: "[T]he contracts may yet be banned by §1 if unreasonable restraint was either their object or effect." *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 614 (1953). Also, *Cities Service Oil Company* v. *Coleman Oil Company, Inc.*, 470 F. 2d 925, 930 (1st Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).[5]

[5]The §1, Sherman Act claim is substantively addressed at pp. 22-24 of the Petition.

## CONCLUSION

For the reasons set forth above, as well as those contained in the Petition, petitioners pray this Court to grant the Petition and review the judgment and opinion below.

Respectfully submitted,

IRVING I. SAUL
6929 North Main Street
Dayton, Ohio 45415
Telephone: (513) 278-4858
*Counsel for Petitioners*

October 9, 1979

## APPENDIX.

**Filed with Clerk of
U.S. District Court on
July 3, 1975**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
Civil Action No. 73-C-355

MAGNUS PETROLEUM COMPANY, INC.
AND MARPAT CORPORATION,
*Plaintiffs,*

vs.

SKELLY OIL COMPANY,
*Defendant.*

**Defendant's Answers To Plaintiffs' First Set of Interrogatories**

TO: IRVING I. SAUL, ESQ.
6929 North Main Street
Dayton, Ohio 45415

EUGENE F. HODSON, ESQ.
601 North Fifth Street
Sheboygan, Wisconsin 53081

Defendant Skelly Oil Company, by its Senior Counsel John F. Smith, answers plaintiffs' First Set of Interrogatories as follows:

[Interrogatory 1-10. Deleted in Printing]

**Interrogatory 11.**

11. For the period from January 1, 1968, to the present, identify each retail level gasoline station outlet located in Wisconsin owned (directly or indirectly), operated or supplied directly by Skelly, answering separately as to each, and for each such retail level gasoline station outlet ("outlet"), state the following:

(a) The approximate date on which each outlet commenced business, and, if no longer doing business, the approximate date of cessation thereof.

(b) Describe all petroleum products sold or marketed at or by each outlet.

(c) State, by month and by year, the volume and amount of petroleum products sold or marketed at or by each outlet, and the manufacturer, refiner, or supplier thereof, respectively.

(d) State the colors, brand or insignia under which each outlet sells or markets petroleum products; and if there has been a change in said colors, brand or insignia, state the approximate date of each such change, and identify each successive colors, brand or insignia.

(e) State whether each outlet and the real property on which it is or was located, answering separately as to each, is or was owned by, leased from, subleased from, or operated under license from Skelly.

(f) State the net profits derived therefrom or realized by Skelly on the sale, consignment, or



delivery of petroleum products to each such outlet, by month and by year.

(g) State the margin, in cents per gallon, realized by Skelly by month and by year on the sale, consignment or delivery of petroleum products to each such outlet.

(h) State all business activities carried out or conducted, other than the sale or marketing of petroleum products, at each such outlet, as set forth in net profits derived therefrom or realized by defendant on account of or by virtue of all such business activities, answering separately for each such business activity.

(i) Identify the manager or other person performing similar duties at each such outlet.

**Reply**

Defendant objects to Interrogatory No. 11 on the grounds that it is vague and ambiguous and is irrelevant to the subject matter and not reasonably calculated to lead to the discovery of admissible evidence.

[Interrogatory 12-24. Deleted in Printing]

**Interrogatory 25.**

25. Identify all persons who supplied information for these Interrogatories and specify those answers as to which each such person supplied information.

**Reply**

Interrogatory Nos. 1 and 2. D.R. Luke, E.J. Peterson, Gorman Smith, Richard Terwilliger, George Merlino, Doug Evans.

Interrogatory No. 3. Payroll Department, Skelly Oil Company.

Interrogatory Nos. 4 and 5. Donald Spears, D.L. Edwards, T.J. Mason.

Interrogatory No. 6. Self-evident.

Interrogatory Nos. 7 and 8. John F. Smith.

Interrogatory No. 13. R.J. Dent.

Interrogatory No. 21. John F. Smith.

Interrogatory No. 23. Company records.

Plaintiffs' first set of interrogatories cut across lines which are not clearly defined and bits and pieces of information necessary to answer them were certainly gathered from other than those mentioned above. However, substantial and good faith compliance with plaintiffs' request has been attempted.

Dated: July 1, 1975.

JOHN F. SMITH, SENIOR COUNSEL
Skelly Oil Company

Subscribed and sworn to before me
this 1st day of July, 1975.

LOUISE N. LAIN
Notary Public, State of Oklahoma
My commission expires: Aug. 24, 1975



**Dayton Daily News**
**Thurs., Aug. 16, 1979**

***Independent gas dealers vanish at alarming rate***

WASHINGTON (AP)—Oil refiners are increasing their share of the retail gasoline market in the United States, while independent gasoline stations disappear at an alarming rate, House investigators said today.

Statistics compiled for a House subcommittee show that almost 100,000 small gasoline dealers have gone out of business since 1972. The volume of gasoline sold by refiner-operated stations almost doubled during the same time period.

"There is no question about it, the small independent gasoline dealer is in trouble," said Rep. Berkley Bedell, D-Iowa, chairman of the small business subcommittee on antitrust and restraint of trade. "Perhaps it would be more accurate to say he is in danger . . . of becoming a vanishing species."

His remarks were prepared for subcommittee hearings today in Sioux City, Iowa, on gasoline marketing practices.

THE SUBCOMMITTEE REPORT says the average monthly sales volume at refiner-operated stations is 2.5 times that of independent dealers.

It says more than 57,000 dealers who leased stations from oil companies have gone out of business since 1972 and almost 41,000 dealers who owned their own stations quite the business during the same period.

"With consumption of branded gasoline virtually unchanged and gasoline prices tripling since 1972, it would appear that more than just natural market forces may be accountable for the disappearance of these small businesses," the report said.